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In the Supreme Court
of the United States

OCTOBER TERM, 1958

No. 514

STATES STEAMSHIP COMPANY, a corporation,
Petitioner,

v.

UNITED STATES OF AMERICA, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF PETITIONER IN REPLY TO BRIEFS OF UNITED STATES, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY AND THE DOMINION OF CANADA

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STATEMENT

Since the Briefs of the United States, the Insurance Companies and the Dominion of Canada all follow more or less the same pattern of argument, the petitioner herewith replies to all of them together. A special comment, however, on the Brief of the United States, is warranted as a preface to this reply.

In an effort to disguise the holding of the Court of Appeals as one turning on the particular facts of the case, the United States emphasizes in detail some of the many facts in the record. In so doing, it not only overlooks the many contradictory facts but also obscures the substantial and important questions of admiralty law which are the very essence of the ruling below and which are set forth in the petition herein.

Thus the Government's Brief cites evidence about padeyes, steering gear, stowage of deck cargo (pp. 5-7) as if this were a trial de novo. But of course it is not. Steering gear and deck cargo were eliminated from further consideration by the Appellate Court's first Opinion (Pet. App. 17a and 18a), and never modified in those respects. We do not have to consider them. Neither do we have to consider the Government's Brief's reference to Port Assistant Engineer Brenneke as a "managerial employee." On our pointing out that the District Judge himself had characterized Brenneke as a "very minor official in the organization" (R. 1727), the Court of Appeals retreated from its previous position, declared Brenneke's status "immaterial" (Pet. App. 41a), and pinned its whole decision on Vallet and crack-sensitivity (Id.).

Nor do we have to consider padeyes. The testimony is uncontradicted that any cracks around padeyes were minor, were all repaired, were common to all ships, were not connected in any way with the crack in the port side, and, since they did not propagate, indicated good tough steel (R. 264; 404-405; 438; 445; 617-619);

623; 2743-2745; 2886). The most that can be claimed for them is that they were merely a bit of controversial evidence. Finally, it was not they which the Court of Appeals said was a warning to Vallet. It was the 22-foot crack, and that alone.

The Government's Brief says, Page 6, that on the fifth voyage another crack was discovered in the ship's "structure" and not repaired. This is misleading. The crack was a small one in an angle iron joining the bulwark rail to a stanchion at the corner of the midship house where cracks frequently occur. It was no part of the hull of the vessel at all; "had no place in the strength pattern of the ship at all"; is frequently omitted entirely, leaving an empty space at that point; was admitted by the Government's own witness at the Coast Guard's hearing "to mean nothing at all"; occurred on the homeward voyage only a few days out from Tacoma, and, quite evidently, was never reported to Vallet because the Chief Engineer rightly regarded it as of no consequence (R. 2663-2679; 2757-2758; 2827-2828; 2887-2888). Neither the Trial Court nor the Court of Appeals even mentioned it.

Despite the efforts of the United States to transpose this case into one concerning only its unique facts, the fact remains that the decision below contains several issues of great importance in the admiralty world and is in direct conflict with the pertinent decisions of this Court and other federal courts of appeals.

COURT OF APPEALS MISAPPREHENDED AND GROSSLY MISAPPLIED THE APPELLATE REVIEW STANDARD (Pet. 3)

That standard is clearly declared by Rule 52(a) F.R.C.P., recognized by the Court of Appeals as binding upon it. (Pet. App. 11a):

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

The question, therefore, on this point is simply this:

Was the Trial Court's decision granting limitation "clearly erroneous," justifying the Appellate Court in reversing it?

In considering this, it must be borne in mind that the Appellate Court's decision is narrowed down to this: The 22-foot crack was a warning to Vallet of the vessel's alleged unusual crack-sensitivity. That is all. Limitation was denied by the Appellate Court solely on that ground.

The respondents' briefs argue that the Appellate Court did not disregard the above Rule. In its first decision it did not. In its last two decisions it did. In the last decision it said:

> "Our opinion stems from the findings of the district Court." (App. E, 36a).

But it does not. If it had, it would have affirmed limitation. The reason it did not was the Court's fatal error in reading into Finding VI something that was not there, and then holding Finding VII inconsistent therewith.

Thus, after reciting the language in VI that "petitioner did not use the due diligence required by law to make the ship seaworthy," the Court said:

> "This language *necessarily* refers to Vallet. For the reasons set forth in McAllister v. United States, 348 U.S. 19, we *cannot go beyond that finding*." (App. D, 26a. Emphasis supplied.)

In short, the Court's whole opinion "stems" from a finding which it has grossly misinterpreted, and replaced with a finding of its own.

Finding VI did not refer to Vallet at all. It did not even refer to crack-sensitiveness. All it found was that petitioner, somewhere down the line, and in some unspecified respect, had been lacking in due diligence. That was sufficient to deny exoneration and was all that the trial Court was talking about.

The Appellate Court having thus erected this false barrier, "which we cannot go beyond," then proceeded to "go beyond" Finding VII granting limitation, and, although that finding was amply supported by substantial evidence, proceeded to try the case de novo and reverse the trial Court.

The whole train of error started with the initial, entirely unwarranted misinterpretation of Finding VI. The result was a complete disregard of the Rule.

EVIDENCE IN SUPPORT OF THE TRIAL COURT'S FINDING

The argument of the respondents that the Trial Court's finding was "clearly erroneous" is only another way of saying that there was no substantial evidence to support it. It therefore becomes appropriate to point out that there was a great deal of such evidence.

The Appellate Court itself, even in its final adverse opinion, admitted that "there is no question but the record contains a substantial amount of evidence" that there was no lack of due diligence in making the ship seaworthy in respect to her steel[1] (Pet. App. 44a); but adds that the Trial Court rejected it in the findings. Petitioner has already shown that the Trial Court did not reject it at all. It merely made a general finding of lack of due diligence without specifying in what respect. And since the steel was better than that in use when the ship was built, and any defect was latent, and there is no way to discover notch-sensitivity short of taking the ship apart and testing the steel in a laboratory, it can hardly be presumed that the Trial Court "rejected" that evidence as it pertained to the steel. In fact the contrary is indicated, at least so far as Vallet is concerned, when, in the very next Finding VII it granted limitation.

Following is some of the "substantial evidence" warranting the Trial Court's finding that there was no privity:

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[1] The Government's brief makes the same admission. Page 10.

1. Perhaps as important as any is the undisputed fact that the steel of the ship was better than the requirements in effect when the ship was built. The importance of this was recognized in the Court's first Opinion, by Judge Denman (Pet. App. 18a).

2. Vallet knew that "all the steel that went into that vessel met all the requirements of the American Bureau of Shipping. The steel was tested when it was manufactured and before it was installed in the vessel." (R. 272). This knowldge on Vallet's part was the same as if he had appointed the American Bureau as his agent to make these tests, and they had reported back to him the good quality of the steel. He was entitled to rely on this, and it was evidence to sustain the Trial Judge in finding no privity.

3. The 22-foot crack was fully repaired[2] to the approval of the United States Coast Guard, the American Bureau of Shipping, Lloyds, the United States Salvage Association, the Repair Yard, Vallet himself and his staff. (R. 869, 875-6; 896-7; 1123; 1130-1; 143-5; 177; 224-5; 266-9; 366, 338-9, 342, 347-9,

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[2] The Government's Brief, p. 3, says that the Board of Investigation defined a Class I Casualty as "a fracture which has weakened the main hull structure so that the vessel is lost or is in a dangerous condition." This, of course, means *before the fracture is repaired.* All the testimony is that once the fracture is repaired the ship is as good as before. The definition quoted was later changed to define a Class I Casualty as any crack more than 10 feet long (R. 1850, 1862, 2769-2770), and it was for that reason that the **PENNSYLVANIA**'s crack was classed as a Class I Casualty.

379-80). These men all considered the ship seaworthy, and Vallet was entitled to rely on the opinion of these competent experts.

4. The 22-foot crack did not weaken the vessel in other parts. It had no relation to the 14-foot crack on the side of the ship on the fatal voyage.

"Did the crack between Frames 72 and 74, in your opinion, have any influence at all in producing the subsequent crack at 93 and 94?

A. None whatever." (R. 2804, Brown).

There was much more expert testimony to the same effect. (R. 269, 299, 343, 470-71, 477, 857; 2742-3, 2764, 2804, 2884.)

Vallet was entitled to rely on this general expert opinion that the 22-foot crack had not weakened the vessel elsewhere.

5. Vallet was without notice of any defect causing the 14-foot crack. It started in a butt weld joining 2 plates, probably from a latent defect in the weld, creating a notch. No one knew of the existence of the notch. It was not discernible in spite of inspections of competent men.

6. The cause of the 22-foot deck crack was fully explained to Vallet by Captain Plover and Chief Engineer Matthews, as due to "extremely heavy weather" and "location of the deck cargo" and the tiny crack at the padeye constituting a notch. (R. 211-213). Vallet was entitled to rely on the vessel's log book (Ex. 44) and the reports of these men that the 22-foot crack was caused by these special circumstances and not by an inherent weakness in the ship.

7. After the 22-foot crack was fully repaired the vessel continued on Voyage 5 clear across the Pacific and back. On the return leg of that voyage the Chief Mate and Chief Engineer Matthews inspected the inside of all the holds "for cracks or for excessive rust or hatch boards broken, or anything." This was in accordance with regular ship's practice. This inspection showed everything satisfactory,—"Nothing wrong at all." (R. 379-380). And a report was made accordingly (R. 380). Vallet was entitled to rely on it.

8. When the ship was drydocked at Seattle before the last voyage, she was inspected by the United States Coast Guard and the American Bureau of Shipping (R. 670, 676, 692, 723, 735, 749-765), also by Chief Engineer Matthews (R. 347-349), and Assistant Port Enginer Brenneke (R. 331-335, 1715-17, 1721). All of these men were experienced and thoroughly competent and passed the vessel as entirely seaworthy. Vallet was entitled to rely on them.

(It is implied in the United States Brief, at page 7, that this inspection was not complete because the inspectors of the Coast Guard and the American Bureau of Shipping did not receive any information "of anything unusual about the vessel, including the 22-foot crack on her last voyage." There is not a syllable of testimony whether they had information of the 22-foot crack or not. The only testimony is this: One of them was asked whether he had any special information of anything "unusual" about the vessel, and he said "No," which of course was correct (R. 685). A crack that is "fully repaired" is no

longer "unusual." The other inspector was asked whether he had received any "special information" about the vessel, and said he checked the records at his office and found there was nothing "outstanding" against her (R. 769). "Outstanding" is the technical word for some item of repair that has to be attended to. When there is nothing outstanding, then the ship's record is clean. The third inspector was never asked anything about this at all. Of course Brenneke and Matthews knew all about the crack.)

9. The 1946 Report, Exhibit 185.

This Report was important evidence in the case. It is discussed in Footnote 9 of the Petition, page 18. It embodies the findings of the Board of Investigation convened by the Secretary of the Navy. Its members, admirals and technical experts, were the most eminent men in their profession. The Report deals with notch-sensitivity in welded ships. After extensive investigation the Board reported that

> "A tendency for certain ships to incur repeated casualties can be measured but the trend is not great and the effect is *not significant*." (Report, 10).

"Not significant" need no definition. It means "indicates nothing," "means nothing," "is of no consequence," "shows nothing," "signifies nothing," "can be disregarded."

This was the most expert opinion in the country. Vallet knew it (R. 209; Appellate Court's Opinion, Pet. App. 27a), and was certainly entitled to rely on it.

Mr. David P. Brown, the foremost expert to testify at the trial, and himself a member of the Ship Structure Committee which superseded the said Board of Investigation, testified to the same effect.

"Q. Does the fact that a ship has cracked—take a major crack like this crack in the deck of the Pennsylvania—does that indicate any tendency or propensity of that ship toward cracking? . . .

A. Insofar as the vessel is concerned, we have never been able to establish any significance." (R. 2743)

Vallet knew of this expert opinion, and was entitled to rely on it.

The Government's Brief says, page 14, that there is no question of "delegation" in this case. Vallet testified (which is apparent throughout the record anyway) that he relied on the reports of his officers and the American Bureau and the Coast Guard. (R. 292). That is delegation.

10. There is no evidence in the Record anywhere to sustain the Appellate Court's finding that the 22-foot deck crack was notice of notch-sensitivity. Mr. Brown says "No," (R. 2743); Captain Nordstrom says "No," (R. 2994, 2917-19); all the ship's witnesses say "No." Nobody says "Yes." Not even cargo's witness Hechtman, who admitted that the *only* reason he thought the PENNSYLVANIA "unusual" was that she suffered *two* major casualties (R. 2605, 2616). But as the second was the 14-foot crack on the fatal voyage, after the ship had left port, it obviously could be no notice to Vallet.

It is impossible to conceive how the Appellate Court could say that Vallet *knew* of the vessel's alleged crack-sensitivity. There is no evidence of it whatever.

All of the foregoing is some of the evidence, and it is all substantial, which is ample to sustain the Trial Court's Finding VII, that petitioner was without privity or knowledge; and demonstrates that the Appellate Court's first Opinion of May 31st, 1957, was correct, when it said that the Trial Court's findings were not "clearly erroneous." It follows that the Court's later opinions reversing itself are wrong, and a clear departure from the Appellate Review Standard declared by Rule 52(a).

The Appellate Court rigidly applied the Rule to Finding VI to deny exoneration, but unfairly refused to give the like treatment to Finding VII and grant limitation.

THE ABSOLUTE IMPUTATION OF KNOWLEDGE (Pet. 19)

Petitioner did not, as stated in the various briefs, argue that the Court held that lack of due diligence invariably involved owner's privity and knowledge. What petitioner did say was that the effect of this decision is that "any lack of due diligence with respect to the structural seaworthiness of the vessel prior to commencing its voyage is necessarily and absolutely imputed to management. In other words, the Court held as a matter of law that the duty to exercise due diligence to make the ship structurally seaworthy is non-delegable not

only under the Carriage of Goods by Sea Act, but also under the Limitation of Liability Act." (Pet. p. 20). And that is exactly what the Court did.

To aid itself in accomplishing this result, the Court adopted as law the singularly novel statements of Gilmore and Black that the "concept of liability" is the same under the Limitation Act as under the Harter Act and the Carriage of Goods by Sea Act, and that while a shipowner will not be denied limitation for negligent acts of his servants committed "once the ship has broken ground," he will be denied it for acts committed by his shore personnel because he did not exercise control over them while he had the chance. The Court, in a footnote, even went so far as to quote, apparently with approval, a statement from Gilmore and Black that "The corporate owner, unlike the individual owner, will not be allowed to escape liability for breach of his basic duty (to furnish a seaworthy ship) by delegating either to a master or to subordinate shore officials." (Pet. Appendix E, 39a).[3]

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[3] The Court also cites The Linseed King, 285 U.S. 502, which did not involve seaworthiness, but rather the act of a superintendent, right on the spot, sending a launch out in an ice-clogged river. The Court, however, should have been mindful of the following from its favorite authors, Gilmore and Black:

> "The more restricted the operation in which a vessel is engaged, the greater will be the degree of control which the corporate owner will be required to exercise over master, crew and subordinate shoreside employees. The loading cases just discussed suggest that in the case of a farflung extensive enterprise, the corporate owner will preserve his right to invoke both Limitation Act and Fire Statute unless the negligence is brought home at a relatively high executive level." P. 704.

Of course this is not the law at all, as pointed out in the Petition for Certiorari, pages 28-9.

But acting on this false concept, the Court imputed to Vallet a knowledge of the vessel's alleged crack-sensitivity, which he did not have, and which neither the United States Coast Guard, the American Bureau of Shipping, nor Lloyds, nor the United States Salvage Association, nor the Secretary of the Navy's Board of Investigation (Ex. 185), nor anybody else had. The Court attributed to him a knowledge superior to all of them. And even went so far as to say he *knew* of the vessel's alleged crack-sensitivity.[4] As to which there was not a syllable of evidence.

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[4] Since all welded ships are notch-sensitive (crack-sensitive) as has been explained, the Court here means *unusual* or *undue* crack-sensitivity, so as to make the ship unseaworthy—as to which there was no evidence, and certainly none that anybody knew about. As before pointed out, all welded vessels are notch-sensitive (crack-sensitive). Given a notch and sufficient stress, they will crack at the notch. The PENNSYLVANIA's steel was better than that required when she was built. All vessels like her were notch-sensitive at temperatures ranging from 30° to 70°. (R. 1859, 1867, 1868.) There was no testimony that she was *unduly* notch-sensitive as the Court seems to hold. The 22-foot crack on Voyage 5 was no evidence of notch-sensitivity (Testimony of D. P. Brown, Senior Vice-President of American Bureau of Shipping, R. 2743, quoted in Note, p. 30 of the Petition). The Secretary of the Navy's Board of Investigation said that such a crack was "not significant." In other words, meant nothing, was not a warning of anything. The 22-foot crack was fully accounted for by an incipient notch, a heavy stress concentrated at that point by a large deckload of lumber, combined with heavy seas. And the only reason it was classed as a Number I Casualty was that it started so far inboard from the gunwale that it was able to progress more than ten feet before it was stopped by the crack-arrester.

Further, in its effort to uphold its interpretation of Finding VI at all costs, and to avoid a reconciliation of the two findings, the Appellate Court entirely ignored the distinction between negligence and privity and knowledge pointed out on pages 22-25 of the Petition.

CONFLICT BETWEEN THE CIRCUITS

The respondents' briefs attempt to explain away the plain conflict between the decision below and that of the Court of Appeals for the Second Circuit in *Peter Paul, Inc. v. Rederi A/B Pulp*, 258 F.2d 901 by referring to certain allegedly distinguishing facts, while ignoring the common facts which led to the two different decisions.

The critical facts in the two cases are almost identical. Both ships cracked, at a notch, because of "notch-sensitivity." Both had been inspected by equally recognized expert agencies, the Christer Salen by Lloyds; the PENNSYLVANIA by the American Bureau of Shipping and the United States Coast Guard. In the Christer Salen, the Second Circuit exonerated the shipowner. In the PENNSYLVANIA the Ninth Circuit denied both exoneration and limitation. The facts and the evidence were identical. The inspections were not impugned for fraud, collusion, incompetence or otherwise, and were uncontradicted.

The weight to be accorded these inspections involves burden of proof, and is a matter of substantive law. The "burden of proof is a matter of substance." *New Orleans v. Harris*, 247 U.S. 367, 372. Since the

"burden of proof is a matter of substance," the effect of these uncontradicted inspections becomes a matter of substantive admiralty law, and when one Circuit allows it and another denies it, a direct conflict is presented.

CONCLUSION

For the reasons set forth herein, as well as those presented in the petition for a Writ of Certiorari, this Court should grant the writ and resolve the important and contradictory rulings of the Court below.

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